Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-55

CECELIA PELAEZ,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAVID A. KATTAN
419 Gravier Street
New Orleans, Louisiana 70130
Telephone (504) 523-3803
ATTORNEY FOR PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No.

CECELIA PELAEZ,
Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Cecelia Pelaez, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on May 22, 1975.

OPINIONS BELOW

The opinion of the Immigration Judge, unreported, appears in Appendix A hereto. The opinion of the Board of Immigration Appeals, unreported, appears in Appendix B hereto. The opinion of the Court of

Appeals for the Fifth Circuit, as yet unreported, appears in Appendix C hereto. The judgment of the Court of Appeals for the Fifth Circuit appears in Appendix D hereto. The order of the Court of Appeals for the Fifth Circuit denying petition for rehearing appears in Appendix E hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 22, 1975. A timely petition for rehearing was denied on June 9, 1975. An order granting a stay of the mandate of the Court of Appeals pending the filing of this petition for a writ of certiorari was issued on June 18, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Board of Immigration Appeals abused its discretion by affirming the denial of petitioner's application for suspension of deportation on the ground that she had spent the greater portion of her seven year period of physical presence in the United States in a "protected status".

2. Whether the Board of Immigration Appeals' affirmance of the denial of deportation under the protected status doctrine constitutes unjustifiable discrimination and an infringement of the concept of equal protection of the laws in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution, and renders §244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. §1254(a)(1), unconstitutional in its enforcement and application.

3. Whether the action of the Court of Appeals in declining to rule on the protected status issue and the hereinabove described related constitutional issue constitutes an unlawful or otherwise improper denial of justice and a sanction of an abuse of discretion by the Board of Immigration Appeals.

4. Whether the Court of Appeals' holding that statutory eligibility must be established prior to the consideration of the protected status issue is an unlawful or otherwise improper denial of justice and a sanction of an abuse of discretion by the Board of Immigration Appeals.

5. Whether the application of the "economic hardship" doctrine by the Court of Appeals and the Board of Immigration Appeals so as to effectively preclude an alien without family ties in the United States from showing that her deportation would result in extreme hardship was an unlawful or otherwise improper denial of justice by the Court of Appeals and an abuse of discretion by the Board of Immigration Appeals.

6. Whether the hereinabove-described application of the "economic hardship" doctrine constitutes unjustifiable discrimination and is an infringement of the concept of the equal protection of the laws in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution and renders Section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. §1254(a)(1) unconstitutional in its enforcement and application.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

Section 244(a)(1), the Immigration and Nationality Act, 8 U.S.C. §1254(a)(1), provides:

> "(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and —
>
> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; . . . ."

STATEMENT OF THE CASE

The petitioner is a native and citizen of the Philippines. She entered the United States on November 11, 1964 as a nonimmigrant visitor for business, which status was subsequently changed to that of a nonimmigrant student authorized to remain in the United States until November 17, 1968. (Record, p. 49.) Deportation proceedings were initiated on April 24, 1969. (Record, p. 54.) Subsequently, petitioner was allowed to remain in the United States because of the introduction of two private bills in her behalf in the Congress. (Record, p. 30.)

The petitioner has no family ties in the United States (Record, p. 30) although she has three brothers in the Philippines. (Record, pp. 31, 38.) Her parents are both dead. (Record, p. 30.) Two of these brothers are tenant farmers and one is unemployed. (Record, p. 32.) She is trained as a computer programmer, but has not obtained employment in this field in the United States because permanent residence is a prerequisite. (Record, pp. 20, 31.) Instead, she obtained employment as a governess, in which position she was earning $135.00 per week as of April 13, 1972. (Record, pp. 32, 37 (reverse side), and 42.)

According to petitioner's testimony in the suspension of deportation hearing, she would have no chance of finding employment in the Phillippines, would be unemployed there, and would be forced to live with her brothers on their tenant farm. (Record, pp. 31, 35-36.) She further testified that she is presently helping her brothers in the Philippines. (Record, p. 32.) She states

in her application for suspension that it is not possible for a Philippine native to obtain a visa to return to the United States. (Record, p. 28.)

The petitioner was ordered deported (with the privilege of voluntary departure) on May 15, 1969. (Record, pp. 46-53.) On May 8, 1972, petitioner reopened the deportation proceedings in order to make application for suspension of deportation under 8 U.S.C. §1254(a)(1). (Record, p. 44.) On September 24, 1973, Immigration Judge Howard I. Cohen denied the petitioner's application. (Appendix A, *infra*.) This decision was affirmed by the Board of Immigration Appeals on July 24, 1974. (Appendix B, *infra*.) On August 22, 1974, a petition for review of the Board's decision was filed with the United States Court of Appeals for the Fifth Circuit pursuant to 8 U.S.C. §1105a. On May 22, 1975, the petition for review was denied by the Fifth Circuit (Appendices C and D, *infra*), and on June 9, 1975, a petition for rehearing was also denied. (Appendix E, *infra*.) Enforcement of the mandate of the Court of Appeals is stayed pending this Court's determination on the granting or denying of this petition, pursuant to a stay of mandate granted by said Court of Appeals on June 18, 1975.

REASONS FOR GRANTING THE WRIT

I.

The Court Of Appeals' Holdings Relative To The Protected Status Issue Allows The Board Of Immigration Appeals To Apply 8 U.S.C. §1254(a)(1) In A Manner Wholly Inconsistent With Its Terms.

An alien can only obtain the relief of suspension of deportation when he (1) has been physically present in the United States for a continuous period of at least 7 years, (2) is a person of good moral character, and (3) is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to such alien or to certain members of his family if they are citizens of the United States or lawfully admitted for permanent residence. 8 U.S.C. §1254(a)(1).

Under the protected status doctrine as set forth by the Board of Immigration Appeals in *Matter of Lee*, 11 I & N 649 (1966), and *Matter of Kajoory*, 12 I & N 215 (1967), if an alien has spent a greater portion of the above-mentioned seven-year period in a "protected status" making him immune from deportation (e.g., a student, a diplomatic employee or the recipient of a private bill to make him a permanent resident), such alien must not only prove the third statutory requirement of extreme hardship but in addition must show "outstanding" or "particularly strong" equities. The protected status doctrine was rejected and *Matter of Lee* was expressly overruled by the Court of Appeals for the Ninth Circuit in *Asimakopoulos v. Immigration and Naturalization Service*, 445 F.2d 1362, 1364 (9th Cir. 1971), on the ground that the Board without any legal authority had divided aliens "into two classes as to which different burdens of proof would be imposed: (1) those aliens who had spent the greater portion of their seven years in a protected status upon whom the burden was placed to prove not only the 'extreme hardship' specified in section 1254, but in addition 'particularly strong equities,' and (2) all other aliens upon whom the burden was placed simply to

prove 'extreme hardship.'" *Asimakopoulos* was followed by *Chan v. Rosenberg*, 445 F.2d 1399 (9th Cir. 1971), and *Yong v. Immigration and Naturalization Service*, 459 F.2d 1004 (9th Cir. 1972).

In the instant case the Immigration Judge's decision was based on two grounds: (1) petitioner had not shown extreme hardship, and (2) petitioner had spent the greater portion of her seven-year residency period in a protected status. This decision was affirmed by the Board of Immigration Appeals.

The Court of Appeals declined to directly rule on the protected status point or to comment extensively thereon. Rather, it confined this issue to a footnote, in which it made two statements: (1) the Ninth Circuit cases prohibiting the application of the protected status doctrine are inapplicable where extreme hardship has not been shown, and (2) its decision was not based on the protected status issue but on petitioner's failure to establish extreme hardship. Appendix C, *infra*, at footnote 3.

Inherent in the Court of Appeals' refusal to rule on the protected status issue is the holding that so long as there is any evidence in the record to sustain the Board's finding of no extreme hardship, the Board's application of the protected status doctrine need not be considered. We respectfully submit that this holding gives free license to the Board of Immigration Appeals to arbitrarily impose a higher burden of proof than that set forth in 8 U.S.C. §1254(a)(1), on aliens who have spent the major part of their seven-year residency period in a protected status. This is because such

practice is not even questioned, so long as there is any evidence whatsoever in the record to support a finding of no extreme hardship. We submit that this ruling sanctions a procedure by the Board which has so far departed from the accepted and usual course of administrative proceedings as to call for an exercise of this Court's power of supervision.

II.

The Court Of Appeals' Ruling On The Protected Status Issue Conflicts With Three Decisions Of The Ninth Circuit Court Of Appeals.

A. *The Decision Below Conflicts with Asimakopoulos v. Immigration and Naturalization Service.*

The Court of Appeals' ruling on the protected status issue, hereinabove described, conflicts in substance with the Ninth Circuit holding of *Asimakopoulos v. Immigration and Naturalization Service*, 445 F.2d 1362 (9th Cir. 1971), by so limiting its effect as to undermine and render it virtually meaningless. To allow the Board to apply the protected status doctrine whenever there is any evidence to support a finding of no extreme hardship permits an Immigration Judge to approach a case involving an alien who has been in a protected status with the preconceived idea that such alien's deportation will be suspended only in the most exceptional circumstances. We submit that this effect of the Court of Appeals' holding conflicts with the entire reasoning and philosophy underlying the *Asimakopoulos* case.

B. *The Decision Below Conflicts with Loza-Bedoya v. Immigration and Naturalization Service.*

The Court of Appeals' holding that the issue of protected status need not be considered so long as there is any evidence to sustain the Board's finding of no extreme hardship directly conflicts with the Ninth Circuit decision of *Loza-Bedoya v. Immigration and Naturalization Service*, 410 F.2d 343, 346 (9th Cir. 1969). See also: *Song Jook Suh v. Rosenberg*, 437 F.2d 1098, 1102 (9th Cir. 1971). As discussed above, inherent in the Court of Appeals' refusal to rule on the protected status issue is the holding that so long as there is any evidence in the record to sustain the Board's finding of no extreme hardship, it is permissible for the Board to abuse its discretion by misunderstanding and misapplying the relevant legal standards so as to significantly and unfairly increase the burden of proof required of the alien. We respectfully submit that in so ruling, the Court of Appeals erroneously disregarded the fact that the evidentiary issue and the protected status issue are two entirely separate points. Thus, an affirmance of the Board's finding of no extreme hardship does not render moot the protected status issue. We submit that the Court of Appeals' holding directly conflicts with *Loza-Bedoya*, *supra*, 410 F.2d at 346, in which the Ninth Circuit said:

> "To review that denial of relief [suspension of deportation] a consideration of abuse of discretion would necessarily be two-fold — (1) if reasonably supported by *any* evidence the determinations of administrative tribunals

> must be affirmed; (2) if however, not supported by evidence *or although supported by evidence the decision is the result of a misunderstanding of the law, an administrative determination will be reversed.*" (First emphasis by the Court; second emphasis added.)

C. *The Decision Below Conflicts with Yong v. Immigration and Naturalization Service.*

The Court of Appeals ruled that the Ninth Circuit's prohibition against the Board's use of the protected status doctrine only applies after extreme hardship has been shown. We respectfully submit that this holding directly conflicts with the Ninth Circuit case of *Yong v. Immigration and Naturalization Service*, 459 F.2d 1004 (9th Cir. 1972). In the Court of Appeals' opinion at footnote 3 (Appendix C, *infra*), it was said that the Ninth Circuit cases prohibiting the application of the protected status doctrine were inapplicable to the instant case because "in both these cases [*Asimakopoulos*, *supra* and *Chan*, *supra*] statutory eligibility has been established" meaning that extreme hardship had been shown in the *Asimakopoulos* and *Chan* cases. However, the Court declined to even mention *Yong v. Immigration and Naturalization Service*, *supra*, which decision was extensively discussed in petitioner's Reply Brief and Petition for Rehearing, and in which case the Ninth Circuit expressly reversed the Board for two reasons: (1) the application of the protected status doctrine, *and* (2) the finding that extreme hardship was not present. Thus,

the Ninth Circuit in *Yong* clearly held that the prohibition against the use of protected status doctrine applies whether or not the Board finds that extreme hardship has been proved. Indeed, the philosophy underlying all three Ninth Circuit cases is a desire to prevent the Board from increasing the third statutory requirement for eligibility for suspension from "extreme hardship" to "particularly strong" or "outstanding" equities.

III.

The Court Of Appeals' Holding On The Economic Hardship Issue Allows The Board Of Immigration Appeals To Effectively Preclude Aliens With No Family Ties In The United States From Obtaining Suspension Of Deportation.

The Court of Appeals affirmed the Board of Immigration Appeals' holding that there is nothing more in this case than economic hardship, despite the fact that the record shows that the following non-economic factors exist: (1) petitioner would suddenly, after ten years, be compelled to undergo a complete change in her way of life from that of a self-supporting, relatively comfortable city dweller in the United States to an inhabitant of a primitive tenant farm in the Philippines (Record, 31-32, 36); (2) she would be forced to discontinue sending financial assistance to her parentless younger brothers (Record, 30-32), a fact which we submit would cause her extreme mental anguish; and (3) it would be impossible for her to obtain a return visa should she be deported (Record, p. 38).

Federal appellate courts have held that some economic hardship, standing alone, does not constitute extreme hardship within the meaning of 8 U.S.C. §1254(a)(1). *Nishikage v. Immigration and Naturalization Service*, 443 F.2d 904 (9th Cir. 1971); *Yeung Ying Cheung v. Immigration and Naturalization Service*, 422 F.2d 43 (3rd Cir. 1970). But we submit that what is involved here is not simply a factual question as to whether or not petitioner would suffer economic hardship upon being deported. Rather, there is a highly important and far-reaching issue present in this case. We contend that this case is an example of a common practice under which the Immigration Judges and the Board automatically categorize any hardship whatsoever suffered by an alien without family ties in the United States as "economic". Thus, petitioner had little or no chance of prevailing before the Immigration Judge and the Board members because of these officials' erroneous interpretation of the "economic hardship doctrine". We strongly believe that the Board has failed in the instant case, and very likely in numerous similar cases, to take into consideration significant and legitimate claims of hardship put forth by the alien simply because she does not have family ties in the United States.

IV.

The Court Of Appeals' Ruling Presents Important Constitutional Issues.

We submit that this Court should also grant writs because there are present in this case important questions concerning the constitutionality of 8 U.S.C.

§1254(a)(1) in its enforcement and application. Briefly, we contend that the Board's reliance on the protected status doctrine results in a classification of aliens into two groups, one of which must sustain a higher burden of proof in order to obtain suspension of deportation, according to the wholly arbitrary factor of whether or not such aliens have spent part of their seven year period in a protected status. See *Asimakopoulos, supra*, 445 F.2d at 1364. We further submit that the Board's refusal to take into consideration legitimate hardship factors raised by aliens without family ties unjustly discriminates against such aliens. In both instances we submit that there has been unjustifiable discrimination and an infringement of the concept of equal protection of the laws in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution, *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694 (1954), *Frontiero v. Richardson*, 411 U.S. 677, 680, 93 S.Ct. 1764, 1767 at n. 5 (1972), *Johnson v. Robinson*, 415 U.S. 361, 94 S.Ct. 1160, 1104 (1974), which renders 8 U.S.C. §1254(a)(1) unconstitutional in its enforcement and application. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374, 6 S.Ct. 1064 (1886); *United States v. Berrigan*, 482 F.2d 171, 174 (3rd Cir. 1973).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

DAVID A. KATTAN
419 Gravier Street
New Orleans, Louisiana 70130
Telephone: (504) 523-3803

CERTIFICATE OF SERVICE

I certify this ___ day of July, 1975, that I have served copies of the foregoing petition for writ of certiorari, and the attached appendix on the Immigration and Naturalization Service by mailing same, postage prepaid, to John L. Murphy and Chester J. Halicki, United States Department of Justice, Government Regulation Section, Criminal Division, Washington, D. C. 20530, and to United States Attorney, 500 St. Louis Street, New Orleans, Louisiana 70130.

DAVID A. KATTAN

APPENDIX A

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A14 446 013 — New York

In the Matter of
CECILIA PELAEZ
Respondent

IN DEPORTATION PROCEEDINGS

CHARGE: I & N Act — Section 241(a)(2) (8 USC 1251(a)(2)) — remained longer — visitor for business and student

APPLICATION: I & N Act — Section 244(a)(1) (8 USC 1254(a)(1)) — Suspension of deportation, in alternative: voluntary departure

In Behalf of Respondent:
Millard Ring, Esq.
11 Broadway
New York, N. Y. 10004

In Behalf of Service:
Nathan Levine, Esq.
Trial Attorney
New York, N. Y. 10007

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 36-year-old unmarried female alien, a native and citizen of the Philippines who

entered the United States at Honolulu, Hawaii on November 11, 1964, at which time she was admitted as a nonimmigrant visitor for business which status was changed to that of a nonimmigrant student and was authorized to remain in the United States until November 17, 1968. On May 15, 1969 an order was entered by the Special Inquiry Officer granting the respondent the privilege of voluntary departure with the further provision for her deportation to the Philippines. Subsequently, on February 13, 1973 the proceedings were reopened to permit the respondent to apply for suspension of deportation.

At the reopened hearing the respondent testified that she has three married brothers residing in the Philippines, two of whom are tenant farmers and the third is a helper to one of the others. She is employed as a governess, earning $135 per week. Her assets consist of approximately $3,000 in cash, stocks and bonds.

The record reflects that the respondent has been the beneficiary of two private bills introduced in the Congress on the basis of which her stay in the United States has been extended from January 27, 1969 to April 17, 1972.

Respondent asserts that she has never belonged to any subversive organization, that she has been continuously physically present in the United States not less than seven years prior to the suspension application and that she has no criminal record. An independent character investigation conducted by the Immigration and Naturalization Service has been entirely favorable to the respondent and tends to confirm re-

spondent's residence in the United States since 1964. A check of the appropriate local and federal agencies disclosed no criminal record relating to the respondent. I find, therefore, that the respondent has met the requirements for suspension of deportation insofar as good moral character and continuous physical presence are concerned.

The sole question remaining is whether deportation would result in extreme hardship to her (8 CFR 242.17(d)). Respondent has not been married. She has no family ties in the United States. Her sole living relatives, three brothers, live in the Philippines.

Respondent asserts extreme hardship would ensue to her if required to leave this country because of difficulty in obtaining employment in the Philippines. She has been trained to be a programmer as a result of her schooling in the United States. She has not obtained employment in this field because permanent residence is a prerequisite. However, in the Philippines, respondent alleges, it will be impossible to obtain such employment because one "needs someone in the government to get a good job." Further, the salary of a governess in the Philippines is too small to consider such a position. Lastly, she asserts that her brothers lease farmland and are all poor and could not help her financially.

Concededly the respondent's deportation from the United States would result in economic detriment to her. However, under the circumstances present in this case economic detriment in and of itself does not amount to "extreme hardship". See Matter of

Sangster, 11 I&N Dec. 309. Other than respondent's self serving statement there is no evidence present in the record showing that the respondent could not obtain suitable employment in the Philippines.

It should be noted that the greater portion of the seven year physical presence respondent had in the United States was acquired while she was in a protected state. From October 1965 to June 1968 she was permitted to be here as a student. Thereafter two private bills were introduced in the Congress in her behalf: January 27, 1969 and January 22, 1971.

The House Judiciary Committee has disapproved suspension to "cases where the alien has been for the greater part of the minimum seven year period in a legal status or a protected status. Such cases include but are not limited to . . . students" and "beneficiaries of private bills . . ." (Report No. 1167, October 14, 1965; Report No. 2151, September 28, 1966; Report No. 1009, December 7, 1967).

Respondent has been physically present in the United States for a period barely in excess of the minimum seven year requirement and the major portion of that physical presence was accumulated in a manner on which Congress looks with askance. As a matter of discretion, I would decline to authorize suspension of deportation.

Although no mention was made at the reopened hearing concerning voluntary departure, it will be assumed that respondent has requested such relief and it will again be granted. Further, it is assumed that respondent would designate the Philippines as her destination if deported, a designation she had made at her first hearing.

ORDER: IT IS ORDERED that the application for suspension of deportation under Section 244 of the Immigration and Nationality Act be denied.

IT IS FURTHER ORDERED that in lieu of an order of deportation respondent be granted voluntary departure without expense to the Government on or before the time set by the District Director, or any extension beyond such date as may be granted by the District Director and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: respondent shall be deported from the United States to the Philippines on the charge contained in the Order to Show Cause.

HOWARD I. COHEN
Immigration Judge

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals
Washington, D.C. 20530

File: A14 446 013 — New York

In Re: CECILIA *PELAEZ*

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Millard A. Ring, Esquire
11 Broadway
New York, New York 10004

ON BEHALF OF I&N SERVICE:
Paul C. Vincent
Appellate Trial Attorney

ORAL ARGUMENT: March 18, 1974

CHARGES:

Order: Section 241(a)(2), I&N Act, (8 U.S.C. 1251(a)(2)) — nonimmigrant visitor for business and student — remained longer than permitted

APPLICATION: Suspension of deportation; in the alternative, voluntary departure

This is an appeal from the order of deportation entered by the immigration judge on September 24, 1973. The appeal will be dismissed.

The record relates to a 36 year old female alien, a native and citizen of the Philippines, who entered the

United States on November 11, 1964, at which time she was admitted as a nonimmigrant visitor for business. Her status was subsequently changed to that of a nonimmigrant student. She was authorized to remain in the United States until November 17, 1968. She has remained thereafter without authority.

A deportation hearing was originally held on May 15, 1969, at which she admitted deportability, and was granted the privilege of voluntary departure. Thereafter she moved to reopen to apply for suspension of deportation, under section 244(a)(1) of the Immigration and Nationality Act. Her motion to reopen was granted and a new hearing was conducted on February 13, 1973.

The Act provides that suspension of deportation may be granted to aliens who establish that deportation would result in extreme hardship, section 244(a)(1). The respondent's application for suspension was denied by the immigration judge on the ground that she has not established that her deportation would result in extreme hardship. We agree with the decision of the immigration judge. The respondent has no family ties in the United States. All her family is in the Philippines. She is educated as a computer programmer but has been unable to get a job in this country in that field. She has been working as a live-in household employee. She claims that she would not make nearly as much money in the Philippines as she does here and that she would be unable to obtain employment in the Philippines as a computer programmer. We find that extreme hardship is not present in this case. The mere fact that the respondent would suffer some economic hardship does not constitute "extreme hardship", *Matter of Uy*, 11 I&N 159 (BIA 1965), *Matter of Sangster*, 11 I&N 309 (BIA 1965).

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order, the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

Chairman

APPENDIX C

Cecelia PELAEZ, Petitioner,
versus
IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 74-3197.

United States Court of Appeals,
Fifth Circuit.

May 22, 1975.

Petition for Review of an Order of the Immigration and Naturalization Service (Louisiana Case).

Before GIBSON*, THORNBERRY and AINSWORTH, Circuit Judges.

PER CURIAM:

Petitioner Cecelia Pelaez, a 36-year-old native and citizen of the Philippines, seeks review of the decision of the Board of Immigration Appeals dated July 24,

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* Of the Eighth Circuit, sitting by designation.

1974, which affirmed the denial by the immigration judge of the suspension of her deportation.

Petitioner entered the United States on November 11, 1964 as a nonimmigrant visitor for business. Her status was later changed to a nonimmigrant student which authorized her to remain here until November 17, 1968. She was ordered deported in May 1969 but two private bills pending, introduced in Congress on her behalf, continued her stay. When the bills failed of passage, she filed this application for suspension of deportation under 8 U.S.C. § 1254(a)(1).

8 U.S.C. § 1254(a)(1) reads as follows:

> (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and —
>
> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien

lawfully admitted for permanent residence; or

. . . . .

The immigration judge found that petitioner had satisfied the first two requisites of the subsection pertaining to physical presence in the United States for seven years, and that she was of good moral character, but had not shown that her deportation would result in extreme hardship, and thus had failed to establish the statutory conditions precedent to the Attorney General's exercise of discretionary relief. Kimm v. Rosenberg, 363 U.S. 405, 80 S.Ct. 1139, 4 L.Ed.2d 1299 (1960); United States v. Shaughnessy, 353 U.S. 72, 77 S.Ct. 618, 1 L.Ed.2d 652 (1957); 2 Gordon and Rosenfield, Immigration Law and Procedure § 7.9e (1972).

Petitioner is not married and has no family ties in the United States but has three brothers living in the Philippines, two of whom are tenant farmers and one of whom is unemployed. Though educated in this country as a computer programmer, she works as a governess earning $135 per week and holds property, cash and stock worth approximately $3,000.

She claims extreme hardship will result from deportation primarily because of the difficulty of obtaining employment and the lower standard of living in the Philippines. Additional factors urged are the impossibility of obtaining a return visa, the inability to continue the support of her brothers and the disruption of the way of life to which she has become accustomed.

Economic hardship has consistently been rejected as sufficient to compel a finding of extreme hardship. Nishikage v. Immigration and Naturalization Service, 9 Cir., 1971, 443 F.2d 904; Fong Choi Yu v. Immigration and Naturalization Service, 9 Cir., 1971, 439 F.2d 719; Yeung Ying Cheung v. Immigration and Naturalization Serv., 3 Cir., 1970, 422 F.2d 43, 46-47; Kasravi v. Immigration and Naturalization Service, 9 Cir., 1968, 400 F.2d 675, 676. Petitioner, who has the burden of establishing the statutory prerequisites, has failed to carry this burden. Considering all these factors, the immigration judge found that Pelaez failed to prove extreme hardship. We agree with this finding for the reasons stated by the judge.[1]

Finally, Pelaez asserts that 8 U.S.C. § 1254(a)(1) is unconstitutional on its face and as applied because it discriminates against aliens without family ties in the

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1 In his written decision, the immigration judge held, in pertinent part, as follows:

> The sole question remaining is whether deportation would result in extreme hardship to her (8 CFR 242.17(d)). Respondent has not been married. She has no family ties in the United States. Her sole living relatives, three brothers, live in the Philippines.
>
> Respondent asserts extreme hardship would ensue to her if required to leave this country because of difficulty in obtaining employment in the Philippines. She has been trained to be a programmer as a result of her schooling in the United States. She has not obtained employment in this field because permanent residence is a prerequisite. However, in the Philippines, respondent alleges, it will be impossible to obtain such employment because one "needs someone in the government to get a good job." Further, the salary of a governess in the Philippines is too small to consider such a position. Lastly, she asserts that her brothers lease farmland and are all poor and could not help her financially.
>
> Concededly the respondent's deportation from the United States would result in economic detriment to her. However, under the circumstances present in this case economic detriment in and of itself does not amount to "extreme hardship". See Matter of Sangster, 11 I&N Dec. 309. Other than respondent's self serving statement there is no evidence present in the record showing that the respondent could not obtain suitable employment in the Philippines.

United States.[2] She contends that an alien with family here can base suspension of deportation on his family's hardship but an alien without family is limited to personal hardship. We find no merit in this contention. Congress has plenary power in the immigration area, particularly in determining which aliens will be admitted and the period they shall remain. Harisiades v. Shaughnessy, 342 U.S. 580, 588-591, 72 S.Ct. 512, 519-520, 96 L.Ed. 586 (1952); Torao Takahashi v. Fish and Game Commission, 334 U.S. 410, 419, 68 S.Ct. 1138, 1142, 92 L.Ed. 1478 (1948); United States v. Shaughnessy, 2 Cir., 1950, 180 F.2d 489, 490. Additionally, the statutory history of Section 1254(a) discloses that the suspension provision was originally enacted in 1940 solely to deal with hardships to the alien's family in the United States which would result from deportation. Eight years later, Congress extended the suspension process to aliens who could show extreme hardship when they had no family ties in this country. Act of July 1, 1948, 62 Stat. 1206; see 2 Gordon and Rosenfield, Immigration Law and Procedure § 7.9a (1972). Congress' extension of the Act to include aliens, such as Pelaez, negates any claims of discrimination.[3]

2 Pelaez also contends that application of the protected status doctrine results in unconstitutional discrimination against her. Since the consideration of her protected status was not necessary to the Board's denial of suspension, we need not consider this claim.

3 Pelaez finds error in the immigration judge's statement that even if petitioner had established statutory eligibility, he would refuse to grant suspension of deportation as a matter of discretion because of the congressional policy statements disfavoring suspension of aliens who remained here in a protected status, i. e., student. The Ninth Circuit in Asimakopoulos v. Immigration and Naturalization Serv., 9 Cir., 1971, 445 F.2d 1362 and Chan v. Rosenberg, 9 Cir., 1971, 445 F.2d 1309, recently overturned the Board's ruling denying suspension based on use of protected status doctrine. In both of these cases statutory eligibility had been established; thus they are not applicable in the instant case. Our decision in this case, however, is not based on this point, but on the failure of petitioner to establish extreme hardship.

The decision of the Board of Immigration Appeals is AFFIRMED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-3197

Your No. A14-446-013

CECELIA PELAEZ,
Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review of an Order of the Immigration and Naturalization Service (LOUISIANA CASE)

Before GIBSON*, THORNBERRY and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Cecelia Pelaez for review of an order of the Immigration and Naturalization Service of the United States, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for review of an order of the Immigration and Naturalization Service in this cause be, and the same is hereby, affirmed;

It is further ordered that petitioner pay to respondent, the costs on appeal to be taxed by the Clerk of this Court.

May 22, 1975

Issued as Mandate:

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* Of the Eighth Circuit, sitting by designation.

APPENDIX E.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-3197

CECELIA PELAEZ,
Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service
(Louisiana Case)

ON PETITION FOR REHEARING
(June 9, 1975)

Before GIBSON*, THORNBERRY and AINSWORTH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

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* Of the Eighth Circuit sitting by designation.

Supreme Court, U. S.
FILED
SEP 17 1975
MICHAEL RODAK, JR., CLERK

No. 75-55

In the Supreme Court of the United States

OCTOBER TERM, 1975

CECELIA PELAEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-55

CECELIA PELAEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner seeks review of the denial of her application for suspension of deportation on grounds of extreme hardship.

Petitioner is a native and citizen of the Philippines. She was admitted to the United States as a non-immigrant visitor on November 11, 1964. Her status was subsequently changed to that of a non-immigrant student and she was authorized to remain in this country until November 17, 1968. However, petitioner illegally remained here beyond the authorized period and deportation proceedings were commenced. Following a hearing, at which she conceded the factual allegations of the deportation charge, petitioner was found deportable and granted the privilege of voluntary departure.

Petitioner thereafter moved to reopen the proceeding to apply, pursuant to 8 U.S.C. 1254(a)(1),[1] for suspension of deportation. The motion was granted and a new hearing was held on February 13, 1973. At the hearing, petitioner attempted to make the required showing of extreme hardship by arguing that she would suffer economic disadvantages if she were required to return to the Philippines. Petitioner testified that, although she was employed as a governess (R. 31, 32),[2] she had been trained as a computer programmer and would be unable to obtain employment in that capacity in her native country (R. 35). Petitioner also noted that she has no relatives in the United States and that her family resides in the Philippines (R. 30-31).

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[1]8 U.S.C. 1254(a)(1) provides, in pertinent part:

> [T]he Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
>
> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

[2]"R." refers to the certified record of the deportation proceedings.

The Immigration Judge denied relief, finding (Pet. App. 3a) that "[E]conomic detriment in and of itself does not amount to 'extreme hardship' " and that "Other than respondent's self serving statement there is no evidence present in the record showing that the respondent could not obtain suitable employment in the Philippines" (*id.* at 4a).

The Board of Immigration Appeals affirmed, ruling (Pet. App. 7a) that "[E]xtreme hardship is not present in this case."

The court of appeals affirmed. Although the Immigration Judge said that he would have denied relief under the protected status doctrine even if petitioner had demonstrated extreme hardship, the court affirmed solely "on the failure of petitioner to establish extreme hardship" (Pet. App. 12a, n. 3).

1. Petitioner claims that the decision of the court of appeals conflicts with several decisions of the Ninth Circuit[3] disapproving denials of discretionary relief by the Board of Immigration Appeals based on the "protected status" doctrine, which provides that applicants for suspension of deportation who have spent all or substantial portions of the required seven-year period in this country (Section 1254(a)(1)) in a protected status (for example, under a student visa) must show special equities beyond extreme hardship as a condition of relief. But the court of appeals specifically declined to face this issue and based its holding instead on petitioner's failure to demonstrate extreme hardship (Pet. App. 12a, n. 3). Thus the conflict petitioner asserts does not exist.

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[3]*E.g.*, *Asimakopoulos* v. *Immigration and Naturalization Service*, 445 F.2d 1362 (C.A. 9); *Chan* v. *Rosenberg*, 445 F.2d 1399 (C.A. 9).

2. Petitioner also contends (Pet. 13) that it is a "common practice" for the Board of Immigration Appeals to deny relief to aliens without family ties in this country on the grounds that any hardship faced by them is merely "economic," and that "very likely" the Board frequently fails properly to consider legitimate claims of noneconomic hardship. These allegations are wholly unsupported by petitioner and unsupportable in fact. If the thrust of petitioner's argument is that she demonstrated other-than-economic hardship and was wrongfully denied relief, that claim must fail. Her position, before the Immigration Judge and now, is essentially that (Pet. 12) upon deportation she will be compelled to change "her way of life from that of a self-supporting, relatively comfortable city dweller in the United States to an inhabitant of a primitive tenant farm in the Philippines * * *." This assertion was based, in turn, only on petitioner's statement (Pet. App. 4a) that she could not find suitable employment in the Philippines. On this record, as the Board of Immigration Appeals and the circuit court correctly ruled, the Immigration Judge did not abuse his discretion in finding that extreme hardship within the meaning of Section 1254(a)(1) had not been demonstrated. See *Nishikage* v. *Immigration and Naturalization Service*, 443 F.2d 904 (C.A. 9); *Yeung Ying Cheung* v. *Immigration and Naturalization Service*, 422 F.2d 43 (C.A. 3).

3. In a related argument, petitioner claims that Section 1254(a)(1) unconstitutionally discriminates against aliens without family ties in this country. This contention was correctly rejected by the court of appeals, upon whose opinion (Pet. App. 12a) we rely:

> We find no merit in this contention. Congress has plenary power in the immigration area, particularly

> in determining which aliens will be admitted and the period they shall remain. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-591 * * *. Additionally, the statutory history of Section 1254(a) discloses that the suspension provision was originally enacted in 1940 solely to deal with hardships to the alien's family in the United States which would result from deportation. Eight years later, Congress extended the suspension process to aliens who could show extreme hardship when they had no family ties in this country. Act of July 1, 1948, 62 Stat. 1206; see 2 Gordon and Rosenfield, Immigration Law and Procedure §7.9a (1972). Congress' extension of the Act to include aliens, such as Pelaez, negates any claims of discrimination.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.